

# CREW | citizens for responsibility and ethics in washington

May 19, 2009

Thomasenia Duncan  
General Counsel  
Federal Election Commission  
999 E Street, N.W.  
Washington, D.C. 20463

Rec'd OGC  
MAY 19 2009  
11:55am

**BY First Class Mail and Fax: 202-219-3923**

Re: Comment on Advisory Opinion Request 2009-12

Dear Ms. Duncan:

On April 3, 2009 former Senator Norm Coleman and his principal campaign committee, Coleman for Senate '08, filed Advisory Opinion Request 2009-12 seeking the Commission's permission to use campaign committee funds to pay for, among other things, the cost of preparing for litigation in Texas and Delaware state courts in which former Senator Coleman may, at some future unknown date, appear as a witness.

The Federal Election Campaign Act of 1971, as amended (the "Act") identifies six specific permissible uses of contributions accepted by a candidate for Federal office, including the payment of expenditures in connection with the individual's campaign for Federal office, ordinary and necessary expenses incurred in connection with duties of the individual as a holder of Federal office, and for any other lawful purpose other than for personal use. 2 U.S.C. § 439a(a); 11 C.F.R. § 113.2. Commission regulations define the term "personal use" as "any use of funds in a campaign account of a present or former candidate to fulfill a commitment, obligation or expense of that person that would exist irrespective of the candidate's campaign or duties as a Federal officeholder." 11 C.F.R. § 113.1(g); *see also* 2 U.S.C. § 439a(b)(2).

The Commission analyzes whether the use of campaign funds to pay for legal fees and expenses constitutes personal use on a case-by-case basis. 11 C.F.R. § 113.1(g)(1)(ii)(A). The Commission has stressed, however, that "legal expenses will not be treated as though they are campaign or officeholder related merely because the underlying legal proceedings have some impact on the campaign or the officeholder's status. Thus, legal expenses associated with a divorce or charges of driving under the influence of alcohol will be treated as personal rather than campaign or officeholder related." Final Rule and Explanation and Justification, Personal Use of Campaign Funds, 60 Fed. Reg. 7862, 7868 (Feb. 9, 1995).

The Commission has routinely allowed a Federal candidate/officeholder to use campaign funds to pay legal fees and expenses incurred in criminal or civil legal proceedings where the candidate/officeholder was a party to the proceeding. *See, e.g.,* Advisory Opinion

Thomasenia Duncan, Esq.  
May 19, 2009  
Page Two

2005-11 (Cunningham), Advisory Opinion 2003-17 (Treffinger), Advisory Opinion 1996-24 (Cooley) and Advisory Opinion 1995-23 (Shays).

The Commission has been considerably less generous in allowing a Federal candidate/officeholder to use campaign funds to defray the legal fees and expenses associated with the candidate/officeholder appearing -- like any other citizen -- as a witness in a criminal or civil proceeding. Indeed, the Commission has never allowed a candidate/officeholder to use campaign funds to pay such legal fees before the candidate/office holder's testimony was compelled or actually given.

In Advisory Opinion 1997-12, the Commission did allow Rep. Jerry Costello to use campaign funds to pay a portion of the legal fees he incurred to prepare and testify before a grand jury investigating a long-time personal friend on gambling-related racketeering charges. Rep. Costello, however, was an unindicted co-conspirator in that criminal case. In Advisory Opinion 2008-07, the Commission was unable to reach a conclusion by the required four affirmative votes with regard to Senator David Vitter's request that he be allowed to use campaign funds to pay legal fees and expenses incurred in seeking to quash a subpoena to compel Senator Vitter to testify in a criminal proceeding.

Both Rep. Costello and Senator Vitter sought advisory opinions from the Commission only after they had testified or had been subpoenaed to testify. Here, former Senator Coleman is prospectively seeking the Commission's permission to use campaign funds to pay legal fees and expenses incurred to prepare for an event that may never occur. Neither of the civil suits at issue in Advisory Opinion Request 2009-12 alleges that former Senator Coleman committed any wrongdoing or was even aware of any wrongdoing allegedly committed by others. Both cases are early in the discovery process and, at this point, the possibility that former Senator Coleman may be compelled to testify in one or both civil proceedings at some undetermined point in the future is merely hypothetical. Commission regulations prohibit the issuance of an advisory opinion to address a hypothetical situation. 11 C.F.R. § 112.1(b).

If the Commission nevertheless chooses to allow former Senator Coleman to use campaign funds to prepare for the possibility that he may have to testify in these civil suits, the Commission should, at the very least, stipulate that the Coleman for Senate '08 committee may not use any funds derived from the Coleman Minnesota Recount Committee (the "Recount Committee") to pay these litigation costs.

The Coleman Minnesota Recount Committee is a joint fundraising committee benefiting Coleman for Senate '08 and the Republican Party of Minnesota. On December 12, 2008, the Recount Committee transferred \$81,375.13 to Coleman for Senate '08. In the first quarter of 2009, the Recount Committee made an additional ten transfers of funds totaling \$244,318.54 to Coleman for Senate '08. That figure amounts to more than half

Thomasenia Duncan, Esq.  
May 19, 2009  
Page Three

of the \$469,563.73 Coleman for Senate '08 had in cash-on-hand on March 31, 2009. Additional transfers may, and most likely have, taken place since Coleman for Senate '08 closed its books to file its April 2009 Quarterly Report on March 31, 2009. Indeed, it is entirely possible that funds derived from the Recount Committee make up a substantial majority of the funds now held by Coleman for Senate '08.

It is beyond dispute that Recount Committee funds may not be used for anything other than recount activities. In Advisory Opinion 2006-24, which established the regulatory regime governing Federal candidate recount committees after the passage of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002), the Commission held that:

Recount funds are subject to the limitations, prohibitions, and reporting requirements of the Act, but they are not in connection with the general election campaign of the Federal candidate because the campaign has ended and because such funds are not otherwise permitted to be used for campaign activity.

Advisory Opinion 2006-24 at page 9 (emphasis added).

More importantly, Advisory Opinion 2006-24 was premised on a stipulation by the requesting parties that recount funds would only be spent for certain specified recount activities. In seeking the opinion, the requesting parties stipulated that:

Money raised by the recount funds will not be used to pay for pre-election or Election Day expenses, such as administrative costs, get-out-the-vote activities or communication expenses. Instead, the recount funds will be used only to pay for 'expenses resulting from a recount, election contest, counting of provisional and absentee ballots and ballots cast in polling places,' as well as 'post-election litigation and administrative-proceeding expenses concerning the casting and counting of ballots during the Federal election, fees for the payment of staff assisting the recount or election contest efforts, and administrative and overhead expenses in connection with recounts and election contests' ('recount activities').

FEC Advisory Opinion 2006-24 at page 2 (emphasis added).

Accordingly, recount funds can only be used to pay for post-election litigation "concerning the casting and counting of ballots during the Federal election" and cannot be used to pay for any legal fees the Federal candidate may incur in post-election litigation unrelated to the casting of ballots.

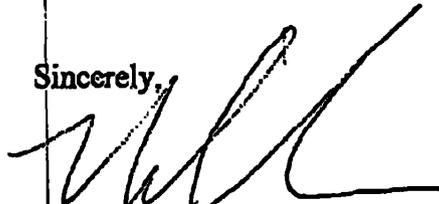
The litigation costs Coleman for Senate '08 seeks to pay were, by the committee's own admission, incurred "[o]ver the last several months," Advisory Opinion Request

Thomasenia Duncan, Esq.  
May 19, 2009  
Page Four

2009-12 at 1, and therefore are not in connection with the general election campaign that ended on November 4, 2008. Recount Committee funds simply cannot be used to pay for such costs.

Accordingly, if the Commission determines Coleman for Senate '08 may use campaign funds to pay the litigation costs specified in Advisory Opinion Request 2009-12, the Commission should nevertheless prohibit Coleman for Senate '08 from using campaign funds derived from the Recount Committee for that purpose.

Sincerely,



Melanic Sloan  
Executive Director